A

JKP SDN BHD

v.

PPH DEVELOPMENT (M) SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
TENGKU BAHARUDIN SHAH JCA
JAMES FOONG JCA
[CIVIL APPEAL NOS: P-02-1030-2004 &
C P-02-1148-2004]
9 FEBRUARY 2007

CONTRACT: *Building contract - Termination - Appeal against decision of trial judge in favour of respondent - Respondent appointed by 1st*
D *defendant as main contractor in a housing development project - 1st defendant subsequently served notice of termination on respondent - Whether termination wrongful - Whether respondent entitled to outstanding amount owed together with interest - Whether finding on liability and quantum by trial judge correct - Whether respondent entitled to refund of*
E *retention sum*

The appellant, a wholly owned company of the Minister of Finance Incorporated, had taken over the task of completing a development project in Penang ('project') facing implementation
F problems. The appellant then allocated the project to the 1st defendant under a privatisation agreement with a condition that the project was to be completed within a specified time. The 1st defendant, in turn, appointed the respondent as the main contractor to complete phase 1 of the project, an appointment
G later formalized by a building agreement signed between the 1st defendant and the respondent. Under the terms and conditions of the building agreement, the respondent was to be paid by the 1st defendant within 30 days from the date of presentation of the interim architect's certificate by the respondent to the 1st
H defendant for work carried out in phase 1 of the project. Right from the start, however, the 1st defendant was unable to fulfil this obligation to pay the respondent and had to borrow money from the appellant to pay the respondent; the relevant loans were released by the appellant directly to the respondent. When phase
I 1 of the project was substantially completed, the 1st defendant once again experienced financial difficulties and failed to settle interim certificates nos. 20 to 23. Though the respondent could have terminated the building agreement for the reason that the 1st

defendant had breached a term in the contract, the respondent did not do so and, instead, continued to provide materials and services to phase 1 of the project. According to the respondent, this was due to a representation made by the appellant to the respondent stating that it would pay the respondent and the respondent's subcontractor for all the work and materials supplied to phase 1 of the project.

Subsequently, because of the outstanding amount due under interim certificates Nos. 20 to 25 as well as the respondent's progress claim No. 26 that had yet to be paid by either the 1st defendant or the appellant, the respondent stopped work. Consequently, the respondent was served with a termination notice from the 1st defendant. The respondent brought this action against the 1st defendant and the appellant, claiming *inter alia* a declaration that the 1st defendant's termination was "wrongful, invalid and of no effect whatsoever", and that the 1st defendant and the appellant pay the respondent the amount due together with interest. The trial judge decided in favour of the respondent, resulting in the present appeals by the appellant against the finding on liability and quantum. Since the trial judge did not order the return of the retention sum, the respondent filed a cross-appeal against the decision of the learned judge after quantum was awarded. The main thrust of the appellant's appeal on liability lay in the dissatisfaction of the trial judge's finding that the representation was made to the respondent. On the appeal over quantum awarded, the appellant was basically dissatisfied with the trial judge's: (i) refusal to allow the appellant to cross-examine the architect who issued the interim certificates nos. 20 to 25, thereby depriving the appellant of an opportunity to challenge the works of the respondent stated therein; (ii) failure to set off an amount for building materials removed from the site before the 1st defendant regained possession of it; and (iii) award of pre-judgment interest to the respondent.

Held (dismissing the appellant's appeals and allowing the respondent's cross-appeal in part)
Per James Foong JCA delivering the judgment of the court:

(1) On the evidence, the trial judge had not only applied the right test as stated in *Hong Chuan Lay v. Dr. Eddie Soo Fook Mun* but had also supported his decision with cogent evidence. As disclosed, at the material time when the representation was allegedly made, the appellant was well aware that a substantial sum was due and owing by the 1st defendant to the

respondent and that the 1st defendant had no means at the material time to satisfy that debt. Apart from that, the appellant also knew that if the debt were not paid, the respondent would stop work. The appellant, being the owner of the project, could not risk that since phase 1 of the project had to be completed urgently in order to pacify the disgruntled house buyers. Under such pressing circumstances and with a track record for bailing out the 1st defendant financially with direct payments to the respondent, it was very probable that the appellant did make the representation to the respondent. This conclusion was further supported by several comfort letters issued by the appellant to the various subcontractors and suppliers of the respondent, and a supplementary agreement between the 1st defendant and the appellant referring to the debt owed. There was also, as the trial judge found, the correspondence from the respondent to the appellant where the respondent complained that the appellant had not acted on its promise to pay. Although that letter was sent after the appellant had refused to pay the respondent, it, being a contemporaneous document, strongly added support to the existence of the representation. (paras 22, 23, 24, 25, 26 & 27)

(2) There was no dispute that after the representation was made, the respondent acted on the inducement contained in the representation by, firstly, not terminating the building agreement, which it could have done, and secondly, by continuing with further constructions on phase 1. The respondent would not have forgone and undertaken such acts if not for the representation made by the appellant. Therefore, on the question of liability, the learned trial judge had not erred in finding for the respondent. (paras 29 & 30)

(3) The interim certificates were issued by the project architect after progress payment claims were submitted by the respondent to the 1st defendant. Before these certificates were issued, the architect must have verified the respondent's claim. Despite this, the appellant now wished to question the architect on the works mentioned in these documents. This should be refused for the simple reason that the defence did not plead that the quality of work and materials supplied as mentioned in the interim certificates were unsatisfactory. Though the authoritative text of *'Hudson's Building and Engineering Contracts'* 10th edn, is correct in stating that whilst

an interim certificate is not conclusive and binding on the employer as an expression of satisfaction with the quality of work and materials supplied, nevertheless, if the employer desires to challenge that, then it was imperative for him to say so in his defence, otherwise he is deemed to have conceded to the quality and materials stated therein. This must not only be pleaded, the employer must also advance reasonable amount of particulars, in detail, as to why the amount stated in such document is disputed and ought not to be paid (*Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr. Leela's Medical Centre Sdn Bhd* (foll)). Since the appellant in this instance had failed to plead this issue in its defence, let alone provide particulars, this ground of appeal could not be sustained. (paras 32, 33 & 34)

(4) Although building materials were found missing from the building site after the 1st defendant repossessed it from the respondent, to succeed in a claim for such items, it was only elementary that one must first identify the missing items and then prove their worth. Here, there was a total absence of the latter. For this, the trial judge's ruling in not awarding any sum to the appellant under this item to set-off against the amount due to the respondent, was upheld. (para 35)

(5) In respect of the appellant's last ground of appeal relating to the award of pre-judgment interest by the High Court, this contention could not be entertained for reason of uncertainty. There was, before this court, no sealed copy of the court order made in respect of pre-judgment interest and what the appellant alleged was not even an item allowed by the trial judge in his grounds of judgment. When there was no definite award made on this matter, no issue could arise out of it. (para 39)

(6) With regard to the respondent's cross-appeal relating to the retention sum set aside in each progress payment, from the evidence adduced, the appellant's witnesses had claimed that certain items in the buildings were missing or damages. This was when they attempted to retake possession of the building site. However, there was no request by either the 1st defendant and/or the appellant to the respondent to make good those missing or damaged items and neither was there any evidence to quantify the amount spent in replacing and repairing them. In their absence, it must be implied that the

A 1st defendant and/or the appellant had agreed to forgo such claim to be paid out of the retention sum. For this, the retention sum must be refunded to the respondent, although the appellant should not be made to refund the entire sum, which was an accumulation of retention sums since progress
B claim no. 1. Since the representation was confined to principally payment of interim certificates no. 20-25 and progress claim no. 26, any refund of the retention sum by the appellant must be restricted to the amount retained under those certificates and claim. (para 43)

C

Bahasa Malaysia *translation of headnotes*

Perayu, sebuah syarikat yang dimiliki sepenuhnya oleh Menteri Kewangan diPerbadan, telah mengambilalih satu projek
D terbelangkalai di Pulau Pinang (projek'). Perayu kemudian menyerahkan projek kepada defendan pertama di bawah satu perjanjian penswastaan dengan syarat projek hendaklah disiapkan dalam satu tempoh tertentu. Defendan pertama pula melantik responden sebagai kontraktor utamanya bagi menyiapkan fasa 1
E projek, dan satu kontrak bangunan mengenai perlantikan tersebut ditandatangani di antara defendan pertama dan responden. Di bawah terma dan syarat kontrak bangunan, bagi kerja-kerja yang dijalankan di fasa 1, defendan pertama akan membayar responden dalam tempoh 30 hari dari tarikh penyerahan sijil arkitek oleh
F responden kepada defendan pertama. Bagaimanapun, sedari mula lagi, defendan pertama gagal memenuhi obligasinya, dan terpaksa meminjam wang dari perayu untuk membayar responden, walaupun wang pinjaman tersebut dibayar terus oleh perayu kepada responden. Setelah sebahagian besar dari fasa 1 siap, defendan
G sekali lagi mengalami masaalah kewangan dan gagal membayar sijil-sijil interim no. 20 hingga 23. Walaupun responden boleh menamatkan kontrak bangunan dengan alasan defendan telah memungkirinya, responden tidak berbuat demikian, sebaliknya terus membekalkan bahan-bahan dan khidmat kepada fasa 1 projek.
H Menurut responden, ia bertindak sedemikian kerana representasi yang dibuat oleh perayu menyatakan bahawa perayu akan membayar responden serta sub-kontraktor responden atas segala kerja dan bahan yang dibekalkan kepada fasa 1 projek.

Berikutnya, responden telah memberhentikan kerja apabila
I defendan pertama mahupun perayu gagal melunaskan pembayaran sijil-sijil interim no. 20 hingga 25 dan tuntuan progres no. 26 responden. Ekoran itu, satu notis penamatan kontrak telah diserah

oleh defendan pertama kepada responden. Akibatnya responden memulakan tindakan di sini terhadap defendan pertama dan perayu, menuntut antara lain deklarasi bahawa penamatan kontrak oleh defendan pertama adalah "salah, tak sah dan tidak berkesan", dan bahawa defendan pertama dan perayu hendaklah membayar kepada responden jumlah yang tertunggak bersekali dengan faedahnya. Yang arif hakim memutuskan untuk responden, sekaligus mencetuskan rayuan-rayuan perayu terhadap dapatan liabiliti dan kuantum. Oleh kerana yang arif hakim tidak memerintahkan pengembalian wang pegangan, maka responden memfail rayuan balas terhadap keputusan yang arif hakim selepas kuantum diaward. Teras utama rayuan perayu terhadap liabiliti adalah ketidakpuasannya terhadap dapatan yang arif hakim bahawa representasi telah dibuat kepada responden. Berkaitan rayuan terhadap kuantum yang diaward, perayu pada asasnya tidak berpuashati dengan yang arif hakim kerana: (i) tidak membenarkan perayu menyoal-balas arkitek yang mengeluarkan sijil interim no. 20 hingga 25, yang dikatakan menghalang perayu dari mencabar kerja-kerja responden yang tercatit di situ; (ii) tidak membuat set off terhadap jumlah bahan-bahan binaan yang dikeluarkan dari tapak sebelum defendan pertama mengambil kembali tapak; dan (iii) mengawadkan faedah pra-penghakiman kepada responden.

Diputuskan (menolak rayuan perayu dan membenarkan sebahagian rayuan balas responden)

Oleh James Foong HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan keterangan, hakim bicara bukan sahaja telah menggunapakai ujian yang betul seperti yang dinyata di dalam *Hong Chuan Lay v. Dr. Eddie Soo Fook Mun* tetapi juga telah menyokong keputusannya dengan keterangan yang kukuh. Seperti yang didedah, sewaktu representasi dikatakan dibuat, perayu amat sedar bahawa sejumlah wang yang banyak sudah tertunggak dan perlu dibayar oleh defendan pertama kepada responden dan bahawa defendan pertama pada ketika itu tidak mempunyai keupayaan untuk melunaskan pembayaran. Selain itu, perayu juga tahu bahawa responden akan memberhentikan kerja jika pembayaran tidak dibuat. Perayu, sebagai tuanpunya projek, tidak boleh mengambil risiko itu dan perlu segera menyiapkan projek bagi menenangkan pembeli-pembeli rumah yang mula merungut. Dalam keadaan yang menekan sedemikian, dan dengan rekod lalunya menyelamatkan defendan

pertama dengan cara membuat bayaran terus kepada responden, maka besar kemungkinan perayu memang ada membuat representasi tersebut kepada responden. Konklusi ini dikuatkan lagi dengan beberapa 'comfort letters' yang ditulis oleh perayu kepada beberapa subkontraktor dan pembekal responden, serta satu perjanjian tambahan di antara defendan pertama dan perayu yang merujuk kepada wang yang terhutang. Dan sepertimana yang didapati oleh hakim bicara, terdapat juga surat menyurat dari responden kepada perayu di mana responden merungut bahawa perayu gagal menunaikan janjinya untuk membayar. Walaupun surat tersebut dihantar selepas perayu enggan membayar responden, namun, sebagai dokumen kontemporari, ia mengukuhkan lagi dakwaan wujudnya representasi.

(2) Tidak dinafikan bahawa selepas representasi dibuat, responden bertindak atas dorongan di situ dengan cara, pertama, tidak menamatkan kontrak bangunan, walaupun ia boleh menamatkannya jika mahu, dan kedua, dengan meneruskan pembinaan fasa 1. Responden tidak mungkin berbuat demikian jika tidak kerana representasi yang dibuat oleh perayu. Oleh itu, atas persoalan liabiliti, yang arif hakim bicara tidak khilaf dalam memutuskan untuk responden.

(3) Sijil-sijil interim dikeluarkan oleh arkitek projek selepas tuntutan-tuntutan bayaran progres dibuat oleh responden kepada defendan pertama. Sebelum sijil-sijil ini dikeluarkan, arkitek tentunya telah mengesahkan tuntutan responden. Walaupun begitu, perayu sekarang ingin menyoal arkitek berhubung kerja-kerja yang disebut di dalam dokumen-dokumen tersebut. Ini harus ditolak atas alasan mudah bahawa pembelaan tidak memplid bahawa kualiti kerja dan bahan-bahan yang dibekalkan seperti yang disebut di dalam sijil-sijil interim tersebut tidak memuaskan. Walaupun buku berautoritatif '*Hudson's Building and Engineering Contracts'* Edition ke 10 betul dalam menyatakan bahawa, sementara sijil interim tidak konklusif dan mengikat ke atas majikan sebagai satu ekpresi kepuasan hati mengenai kualiti kerja dan bahan yang dibekalkan, namun begitu, jika majikan ingin mencabarnya, maka adalah perlu untuknya menyatakan hasrat itu di dalam pembelaannya, jika tidak dia dianggap sebagai telah menerima kualiti dan bahan-bahan yang dicatit di dalamnya. Malah ia bukan sahaja mesti diplid. Majikan juga hendaklah mengemukakan butiran-butiran dalam jumlah yang munasabah, menerangkan dengan secara detail

mengapa jumlah yang disebut di dalam dokumen disangkal atau tidak perlu dibayar (*Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr. Leela's Medical Centre Sdn Bhd* (diikuti)). Oleh kerana perayu di sini gagal memplid isu ini dalam pembelaannya, jauh sekali dari mengemukakan butiran-butiran mengenainya, maka alasan rayuan tidak boleh dipertahankan.

(4) Walaupun bahan-bahan binaan didapati hilang dari tapak binaan selepas defendan pertama mengambilnya semula dari responden, untuk berjaya dalam tuntutan terhadap bahan-bahan tersebut, syarat asasnya adalah bahawa seseorang harus mengenalpasti item yang hilang dan membuktikan nilainya. Di sini, tiada langsung keterangan mengenai nilai barangan yang hilang. Untuk itu, keputusan hakim bicara tidak mengawardkan apa-apa di bawah tajuk ini kepada perayu untuk di potong dari jumlah yang terhutang kepada responden adalah betul.

(5) Mengenai alasan terakhir rayuan perayu yang bersangkutan dengan award faedah pra-penghakiman oleh Mahkamah Tinggi, ia adalah sesuatu yang kabur dan tidak dapat dilayan. Di mahkamah ini, tidak terdapat salinan bermeterai Perintah Mahkamah yang dibuat berkaitan faedah pra-penghakiman dan apa yang didakwa perayu tidak pun menjadi satu item yang dibenarkan oleh hakim bicara dalam alasan penghakimannya. Tiada award yang jelas dibuat dalam soal ini, dan tiada isu boleh berbangkit darinya.

(6) Berhubung rayuan balas responden yang menyangkuti wang pegangan yang dipotong bagi setiap pembayaran progres, keterangan yang ada menunjukkan bahawa saksi-saksi perayu telah menuntut bahawa beberapa barang di bangunan telah didapati hilang atau rosak. Ini sewaktu mereka hendak mengambil semula tapak binaan. Bagaimanapun, tidak terdapat permintaan sama ada dari defendan pertama atau perayu kepada responden untuk mengganti barang-barang yang hilang atau rosak tersebut, dan begitu juga, tiada keterangan menunjukkan berapa jumlah yang dibelanjakan bagi membaiki atau mengganti barang-barang itu. Dalam ketiadaan keterangan-keterangan ini, andaian boleh dibuat bahawa defendan pertama dan/atau perayu bersetuju untuk melupakan tuntutan yang harus dibayar dari wang pegangan tersebut. Untuk itu, wang pegangan hendaklah dipulang kepada responden, walaupun perayu tidak perlu memulangkan keseluruhan jumlahnya yang terkumpul sejak tuntutan progres

A no. 1. Oleh kerana respresentasi pada dasarnya terhad kepada pembayaran sijil-sijil interim no. 20-25 dan tuntutan progres no. 26, pemulangan wang pegangan oleh perayu harus dihadkan kepada jumlah yang dipegang di bawah sijil-sijil dan tuntutan tersebut sahaja.

B

Case(s) referred to:

Dick Bentley Productions Ltd & Anor v. Harold Smith (Motors) Ltd [1965] 2 All ER 67 ***(refd)***

Hong Chuan Lay v. Dr Eddie Soo Fook Mun [2005] 4 CLJ 865 CA ***(foll)***

Kleinwort Benson Ltd v. Malaysia Mining Corp Bhd [1989] 1 All ER 785

C ***(refd)***

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 SC ***(foll)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(refd)***

D **Other source(s) referred to:**

GH Treitel, *The Law of Contract,* 9th edn, p 328

Hudson's Building and Engineering Contracts, 10th edn, pp 492, 497

For the appellant - Ambiga Sreenevasan (Zarizana Abdul Aziz & Emily Sehu with him); M/s K Ahmad & Yong

E *For the respondent - JA Yeoh (Jj Chan with him); M/s Shearn Delamore & Co*

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-85-2002 (MT-1)

Reported by Suresh Nathan

F

JUDGMENT

James Foong JCA:

G

Introduction

[1] The Urban Development Authority was corporatised as UDA Holdings Sdn Bhd (UDA) in 1995. It had more that 20 development projects in Penang. Several of these projects were

H facing implementation problems. Taman Sri Bayu (the project) in Bayan Lepas, Penang, was one of them. Phase 1 of the project, consisting of 730 low and medium cost flats and houses, were sold to various purchasers but around 1998 these flats and houses were only 15% completed. To rehabilitate, the project, the

I Government of Malaysia, through the appellant which is a wholly owned company of the Minister of Finance Incorporated, took over the task of completing the project. The approach of the

appellant was to allocate the project to the 1st defendant in this suit (1st defendant) under a privatization agreement with a condition that this project was to be completed within a specified time. After entering into this agreement with the appellant on 26 May 1988, the 1st defendant appointed the respondent as the main contractor to complete phase 1 of the project. This appointment of the respondent was later formalized by a building agreement (Building Agreement) signed between the 1st defendant and the respondent.

[2] Under the terms and conditions of the Building Agreement, the respondent was to be paid by the 1st defendant within 30 days from date of presentation of the interim architect's certificate (Interim Certificate) by the respondent to the 1st defendant for work carried out in phase 1 of the project. But right from the start, the 1st defendant was unable to fulfill this obligation to pay the respondent. The 1st defendant had to resort to borrowing money from the appellant to pay the respondent. The first was for a sum of RM1,606,115.44. This was followed by a sum of RM2 million given on 19 May 2000. The third was a sum of RM1,940,169.20 given on 4 October 2000. All these loans were released by the appellant direct to the respondent.

[3] By 21 December 2000, when phase 1 of the project was substantially completed, the 1st defendant once again experienced financial difficulties. Interim Certificates bearing no. 20 to 23 amounting to RM1,738,648.45 were not settled by the 1st defendant to the respondent. Though the respondent could have terminated the Building Agreement for reason that the 1st defendant had breached a term in this contract, the respondent not resort to such action. Instead, it continued to provide materials and services to phase 1 of the project. According to the respondent, this was due to a representation (the representation) made by the appellant's Managing Director, one Zulkefli A Hassan (SD1), to his counterpart in the respondent, SP1, and the project director of the respondent, SP2, that the appellant would pay the respondent and the respondent's sub-contractor for all work and materials supplied to phase 1 of the project.

[4] To support the assertion that the representation was made, the respondent highlighted several comfort letters issued by the appellant to the various sub-contractors and suppliers of the respondent involved in phase 1 of the project. These letters declared "that JKP Sdn. Bhd. (appellant) has agreed, in principle,

A to be the project owner of the above development project ... in addition to our current status of being the beneficial land owner ... hence while occasionally injecting fresh funds into the project, JKPSB (appellant) together with FDSB (1st defendant), is doing our utmost to expedite the progress disbursement from end-
B financiers ... We are confident that the outstanding payment to you could be settled by PPH Development Sdn Bhd (main contractor) (respondent) in due course ... trust that you will continue to extend the necessary support to PPH Development Sdn Bhd to ensure the successful completion of the project ...
C Once again we assure you that payment for the outstanding amount due to you would be forthcoming".

[5] In addition to this, the respondent highlighted a supplementary agreement (Supplementary Agreement) between the
D 1st defendant and the appellant. This agreement varies some of the terms in the privatization agreement executed by these parties earlier. One of the terms in this Supplementary Agreement refers to the debt owing by the 1st defendant to the appellant and sub-contractors for phase 1 of the project. This is exposed in the
E following clauses of this agreement:

[6] Clauses 2(c): "As of 31 December 2000, the developer (1st defendant) has completed approximately ninety per centum (90%) of Phase 1 of the Development. A copy of the Progress Report
F No. 58 and Architect's Certificate in relation thereto is annexed hereto as Schedule 3A".

[7] Clause 2(d): "As at 31 December 2000 the liabilities already incurred and as yet unsettled by the Developer pertaining to Phase 1 of the Development to the Main Contractor are estimated at
G Ringgit Malaysia Four Million Three Hundred Eight-Eight Thousand Five Hundred Thirty-Seven and Sen Forty-Seven (RM4,388,537.47) only (hereinafter referred to as "the liabilities"). Copies of the architect's certificates are annexed hereto in a bundle as Schedule 3B".

H

[8] Clause 4 "The owner (the appellant) hereby agrees covenants and undertakes with the Developer that:

(a) The owner shall bear the following liabilities as part of cost of
I and direct expenditure incurred in the Development by the owner (hereinafter referred to as "Direct Expenditure"), which sum shall be taken into account in the calculation of profits derived and generated from the Development:

(i) items 1, 2, 4, 5 and 6 of Schedule III of the Privatisation Agreement;

(ii) a sum not exceeding the aggregate sum of Ringgit Malaysia Four Million (RM4,000,000) only or any further sum as the owner may at its sole discretion decide by way of partial settlement of the Main Contractor's outstanding and payable progressive claims exclusive of the sum of Ringgit Malaysia Three Million Four Hundred Thousand (RM3,400,000) only already advanced including the sums advanced *vide* loan agreement dated 27 November 1998 (hereinafter referred to as "the loan agreement").

[9] It is hereby agreed that the Developer shall not make any claims or disburse any payment in relation to works completed pursuant to Architect Certificates more particularly described and annexed hereto as Schedule 5 which payment has already been advanced by the owner save and except to facilitate or by way of reimbursement to the owner of such payments.

[10] As can be seen from the above, by the beginning of 2001, work on phase 1 of the project was 90% completed. The outstanding amount due under Interim Certificates no. 20 to 25 as well as the respondent's progress claim no. 26 amounted to RM5,433,913.49. When this was not paid by either by the 1st defendant or the appellant, the respondent stopped work. The 1st defendant retaliated with a termination notice to the respondent for failing "diligently to complete the works". Refusing to accept this, the respondent challenged this notice by asserting wrongful termination and insisting that work will only recommence if the respondent is paid. When the matter could not be resolved, the 1st defendant attempted to recover the work site from the respondent. During this period, certain building materials on site went missing. Eventually the site was recovered by the 1st defendant from the respondent but not without consequences. As a result of this discord, the 1st defendant's privatization agreement was terminated by the appellant. Then, the appellant itself was replaced by yet another government body known as Syarikat Perumahan Negara to complete phase 1 of the project.

[11] For this tussle, the respondent brought this action against the 1st defendant and the appellant claiming *inter alia*:

(1) A declaration that the 1st defendant's termination is "wrongful, invalid and of no effect whatsoever".

(2) The 1st defendant and the appellant do pay the respondent a sum of RM5,433,913.49 due under Interim Certificates no. 20 to 25 and respondent's progress claim no. 26.

(3) A sum of RM1,556,198.12 being interest at the rate of 8% per annum on the sum of RM3,970,936.44 due under Interim Certificates no. 20 to 25 as at 30 November 2003 and further interest of 8% per annum on the same amount from 1 December 2004 till date of realization.

(4) An order that an account be taken of the value of all works duly executed by the respondent and payment of any sum found due together with interest of 8% per annum thereon.

(5) Retention sum of RM1,446,980.23 together with interest at the rate of 8% per annum from such date to be determined by the court until full realization.

The 1st Defendant

[12] Summary judgment for a sum of RM3,127,995.35 with interest thereon was obtained by the respondent against the 1st defendant on 8 January 2003. At the time of the trial, the 1st defendant did not appear. Thus when the trial proceeded, it was a contest between the respondent and the appellant.

Appellant's Defence

[13] In its defence, the appellant maintained that it had nothing to do with the respondent. It did not appoint the respondent as the contractor for phase 1 of the project nor did the appellant make the representation as claimed by the respondent. Though admitting that it had made direct payments to the respondent on the three previous occasions as disclosed, the appellant explained that these were done for and on behalf of the 1st defendant who was experiencing cash flow problems at the material time and required loans from the appellant to tie them over this difficult period.

[14] As for the comfort letters, they were never sent to the respondent. They were only forwarded to the respondent's sub-contractors and suppliers. These were intended to encourage them to lend support to the 1st defendant to complete phase 1 of the project. According to the appellant, these letters were never

intended to imply that the appellant would make payment direct to the respondent who would then disburse it to its sub-contractors and suppliers.

[15] With regards to the Supplementary Agreement, the appellant pointed out that the respondent is not privy to this contract. It is strictly an arrangement between the 1st defendant and the appellant. In any event, none of the terms stated in this Supplementary Agreement stipulates that the appellant has undertaken to pay the respondent for what is due and owing by the 1st defendant.

Trial Judge's Findings On Issue Of Liability

[16] At the conclusion of the trial, the trial judge made the following findings:

1. The 1st defendant has failed to pay the respondent a sum of RM1,738,648.45 for Interim Certificates no. 20 to 24.

2. The amount stated in Interim Certificates no. 24 to 25, as well as the respondent's progress claim no. 26, is also due and ought to be paid by the appellant to the respondent.

3. The notice of termination given by the 1st defendant to the respondent is *mala fides*, thus, unlawful.

4. The representation as alleged by the respondent was indeed made by the appellant to the respondent. The reasons for this conclusion are listed as follow:

   (a) The project was an abandoned project. There were 730 purchasers who were constantly complaining that their flats and houses are not completed on time. The appellant was instructed to complete them without further delay. The construction work was carried out by the respondent and Interim Certificates were issued by the architect. The amount claimed under these Interim Certificates was not paid by the 1st defendant and there was a danger that the respondent would stop work. This could have induced the appellant to make the representation to pay the respondent direct.

   (b) Clause 4(a)(ii) of the Supplementary Agreement also discloses that the appellant has expressly declared that it will be responsible to pay up to RM4 million or any further

A sum owed by the 1st defendant so that the respondent's outstanding progress claims can be settled. This, being a contemporaneous document, supports the respondent's claim that the representation was made.

B (c) The appellant has also declared in the comfort letters that they are now the "project owner". The assumption of this status implies that the appellant has taken over the management of phase 1 of the project and would be paying the claims of the respondent and its subcontractors.

C (d) And finally the respondent in a letter to the appellant dated 17 January 2002 has reminded the appellant that "it is because of your (appellant) direct involvement that had assured us and our suppliers to continually provide credit indulgence to your project" that construction work in phase 1 of the project continued.

D

5. The appellant did not fraudulently make the representation to the respondent.

E **Appeal Against Quantum (Appeal No. P-02-1030-2004)**

[17] Dissatisfied with these findings on liability, the appellant appealed. This is listed under Appeal No. P-02-1030-2004.

Orders Of The Trial Judge On Quantum

F

[18] Subsequent to the finding on liability, the trial judge proceeded to decide on the quantum. After hearing, the following orders were handed down:

G 1. The appellant to pay respondent RM5,433,913.49 in respect of Interim Certificates no. 20 to 25 and progress claim no. 26.

2. There shall be interest of 8% per annum on amounts stated in Interim Certificates no. 20 to 25 from the date when the writ was filed to the date of realization.

H

3. Costs to the respondent.

Appeal Against Liability (Appeal No. P-02-1148-2004)

[19] Dissatisfied with the above orders, the appellant filed notice I of appeal. This is listed as Appeal No. P-02-1148-2004.

Cross-Appeal (In Appeal No. P-02-1148-2004)

[20] Since the trial judge did not order the return of the retention sum (retained by the 1st defendant at each stage of the progress payment) amounting to RM1,446,980.23, the respondent filed a cross appeal against the decision of the learned judge after quantum was awarded. This cross appeal is registered under Appeal No. P-02-1148-2004.

Analysis On The Issue Of Liability

[21] The main thrust of the appellant's appeal on liability lies in the dissatisfaction of the trial judge's finding that the representation was made to the respondent.

[22] Like all appeals of this nature, this court is once again forced to re-examine the evidence adduced during trial since the accusation is that the decision is against the weight of evidence. But before we undertake such task, we wish to reiterate that the approach of the Court of Appeal when faced with two conflicting versions where the issue is the creditability of witnesses about what was said or not said, or done or not done, as is the case here, is to give great weight to the view formed by the primary trier of fact and not to differ therefrom save in exceptional circumstances – Court of Appeal decision in *Hong Chuan Lay v. Dr. Eddie Soo Fook Mun* [2005] 4 CLJ 865.

[23] After perusing the evidence, we find that the trial judge has not only applied the right test as stated above, but has also supported his decision with cogent evidence. As disclosed, at the material time when the representation was allegedly made, the appellant was well aware that a substantial sum was due and owing by the 1st defendant to the respondent and the 1st defendant had no means at the material time to satisfy this. Apart from this, the appellant also knew that if this was not paid, the respondent would stop work. The appellant, being the owner of the project, could not risk this since phase 1 of the project had to be completed urgently in order to pacify the disgruntled house buyers. Under such pressing circumstances, and with a track record for bailing out the 1st defendant financially with direct payments to the respondent, we agree with the trial judge's finding that it is very probable that the appellant did make the representation to the respondent.

[24] This conclusion is further supported by the comfort letters and the Supplementary Agreement. On the comfort letters, Ms Ambiga, counsel for the appellant, attempted to persuade us that such letters, in law, do not amount to a contractual promise by the appellant to the respondent. To support this proposition, the case of *Kleinwort Benson Ltd v. Malaysia Mining Corp Bhd* [1989] 1 All ER 785 was cited. Then she reminded us that these letters were never addressed to the respondent. They were only sent to the respondent's subcontractors and suppliers. And finally, the contents do not expressly or, by implication, stipulate that the appellant will pay the debts of the 1st defendant.

[25] Though we are conscious of the fact that these comfort letters do not expressly declare that the appellant would be responsible for the debts incurred by the 1st defendant, but we think Ms Ambiga is mistaken as to the nature of influence these had on the trial judge. By themselves, these letters do not contain the representation nor do their contents bind the appellant to any contractual promise to pay the respondent for the outstanding debts. But by being contemporaneous documents, they infer that the representation was made by the appellant to the respondent. Such approach is not unconventional and not without authoritative support. Chang Min Tat FJ *obiter* in *Tindok Besar Estate Sdn Bhd v. Tinjar Co.* [1979] 2 MLJ 229 @ 234 said:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[26] The other document which carries more weight is the Supplementary Agreement. Again this document should not be taken in isolation. We agree with Ms Ambiga that since the respondent is not a party in this agreement, the respondent is not privy to the terms and conditions therein. But this is not the issue. The focus on this document is that it contains provisions to pay the debts of the 1st defendant direct to the respondent. This is exactly what the respondent claimed that the appellant represented to them. When there exist such similar undertakings,

especially made in a self declaratory statement in a formal document to a party who is very much involved in the matter, then it strongly implies that the representation was made.

[27] Then of course there is also, as the trial judge found, the correspondence from the respondent to the appellant where the respondent complained that the appellant had not acted on its promise to pay. We agree once again that though this letter was sent after the appellant had refused to pay the respondent but, being a contemporaneous document, it strongly adds support to the existence of the representation.

[28] Having come to the conclusion that the representation was indeed made the next question is whether the respondent was induced to act on it. As noted by the learned author G.H. Treitel in *'The Law of Contract'*, 9th edn at p 328: "A statement is likely to be a term of the contract where its importance is such that, if it had not been made, the representee would not have entered into the contract at all". And elaborating on this, Lord Denning said in *Dick Bentley Productions Ltd. & Anor. v. Harold Smith (Motors) Ltd* [1965] 2 All ER 67:

> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it.

[29] Here in our instant case, there is no dispute that after the representation was made, the respondent acted on the inducement contained in the representation by firstly, by not terminating the Building Agreement, which it could have done, and secondly, by continuing with further construction on phase 1. It is our view that the respondent would not have forgone and undertaken these acts if not for the representation made by the appellant.

Conclusion On Liability

[30] Therefore on the question of liability, we are of the view that the learned trial judge has not erred in finding for the respondent.

Appeal On Quantum

[31] On the appeal over quantum awarded, the appellant is basically dissatisfied with the trial judge's:

(a) refusal to allow the appellant to cross-examine the architect who issued the Interim Certificates no. 20 to 25, thereby depriving the appellant of an opportunity to challenge the works of the respondent stated therein;

(b) failure to set off an amount for building materials removed from the site before the 1st defendant regained possession of it; and

(c) award of pre-judgment interest to the respondent.

Refusal To Allow Cross-examination Of The Architect

[32] On the first assertion of the appellant, Ms Ambigar has relied on a passage from the authoritative text of *'Hudson's Building and Engineering Contracts'*, 10th edn, at p 492, which says that interim certificates "in the absence of express provision, are not conclusive or binding on the employer as an expression of satisfaction with the quality of the work or materials" supplied. Furthermore, at p. 497 of the same text it says that these interim certificates do not "bind strangers to the contract unless they have themselves contracted to be bound by them, or are claiming in some way through a party to the contract."

[33] The Interim Certificates were issued by the project architect after progress payment claims were submitted by the respondent to the 1st defendant. Before these certificates were issued, the architect must have verified the respondent's claim. Despite this, the appellant now wishes to question the architect on the works mentioned in these documents. We agree with the trial judge that this should be refused. The reason is simple. The defence did not plead that the quality of work and materials supplied as mentioned in Interim Certificates were unsatisfactory. Though the authoritative text is correct in stating that whilst an interim certificate is not conclusive and binding on the employer as an

expression of satisfaction with the quality of work and materials supplied nevertheless, if the employer desires to challenge this, then it is imperative for him to say so in his defence, otherwise he is deemed to have conceded to the quality and materials stated therein. We are of the further view that not only must this be pleaded, the employer must also advance reasonable amount of particulars, in detail, as to why the amount stated in such document is disputed and ought not be paid. This requirement is derived from the Supreme Court decision in *Pembenaan Leow Tuck Chui & Sons Sdn. Bhd. v. Dr. Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345 @ 366, where the court held that before the employer can dispute such interim certificate, the employer must advance cogent evidence, with reasonable amount of detail, as to why the amount listed in such architect's interim certificate should not become due before unconditional leave to defend is allowed. To support this proposition, the Supreme Court quoted a passage from *'Building Contracts'*, 4th edn by Donald Keating which declares:

> Every case turns upon its facts but excellent evidence is either an admission by the defendant, or his authorized agent, or a certificate by the defendant's architect or engineer, which is a special and formal kind of admission. When evidence of this nature is established the court usually requires cogent evidence from the defendant before it grants leave to defend. Thus merely to allege the existence of defects in the works, or a claim for damages for delay without in each case giving some reasonable amount of detail and of quantification is unlikely to result in leave to defend.

[34] As the appellant has failed to plead this issue in its defence let alone providing particulars, then this ground of appeal cannot be sustained.

Failure To Set-off The Cost Of Building; Materials Missing From The Site

[35] Though building materials were found missing from the building site after the 1st defendant repossessed it from the respondent, but what is the value of such missing materials? To succeed in a claim for such items, it is only elementary that one must first identify the missing items and then prove their worth. Here, there is a total absence of the latter. For this, we uphold the trial judge's ruling in not awarding any sum to the appellant under this item to set-off against the amount due to the respondent.

Pre-judgment Interest

[36] The appellant's last ground of appeal relates to the award of pre-judgment interest by the High Court. It is formulated in this manner:

1. In the respondent's statement of claim, the respondent has made the following claim for interest:

> As against the Defendants, an Order for payment of a sum of RM1,556,198.12 being interest at the rate of 8% per annum on the sum of RM3,970,936.44 due on Architect interim certificates Nos. 20, 21, 22, 23, 24 & 25 as at 30.11.2003 and such further interest at the rate of 8% (per cent) per annum on the said sum of RM3,970,936.44 due from 1.12.2004 till date of full realization.

2. According to the appellant, the High Court has awarded "pre-judgment interest from the date of the Supplemental Agreement, namely 2 January 2001 when the Building Contract did not provide for any late payment interest". The learned judge has therefore "erred in law and/or in fact in finding in effect that the date of the purported representation by the appellant to the respondent was the date of the Supplemental Agreement" when the respondent is not a party to this contract.

[37] This contention caused us to check the court order given in respect of quantum for this case. To our surprise, no seal copy of this order is annexed to the appeal record in respect of this appeal. Only a draft order is attached. And even on this draft order there are numerous amendments with crossing-outs and handwritten remarks over the portion associated with pre-judgment interest. This draft order has obviously not received the sanction of the Registrar of the High Court since we noticed that no officer of the High Court has signed thereon and affixed the common seal of the court thereon.

[38] We then proceeded to peruse the grounds of judgment of the trial judge concerning this issue. We found this recorded:

> Tuntutan faedah ke atas amaun Sijil Akitek No. 20-25 dari tarikh matang ditolak/tidak dibenarkan. Faedah 8% dibenarkan dari tarikh pemfailan tindakan Mahkamah.

[39] Against this background, we are of the view that this contention of the appellant cannot be entertained for reason of uncertainty. There is, before us, no sealed copy of the court order made in respect of pre-judgment interest. And what is alleged by the appellant is not even an item allowed by the trial Judge in his grounds of judgment. When there is no definite award made on this matter, then no issue can arise out of it.

Conclusion

[40] For reasons aforesaid, we dismissed the appellant's appeal in respect of quantum in P-02-1148-2004.

Cross-Appeal

[41] The cross-appeal of the respondent relates to the retention sum set aside in each progress payment. It is based on a percentage of the amount claimed. Such sum is intended to indemnify the 1st defendant and/or the appellant for any cost jnvolved in making good any defect discovered after the buildings in phase 1 are completed. If such defect is not rectified then the 1st defendant and/or the appellant would deduct from this retention sum the cost to make good such defect. If there is any balance left, it would be returned to the respondent. And if there is no defect detected during the defective period, the entire sum so retained should to be handed back to the respondent. In short, the respondent received or will receive less than what he ought to be paid for the work and materials supplied under its progress claims. Now, the respondent demands the return of such sum retained or to be deducted. So, should the respondent be paid such sum?

[42] The circumstances of this case are somewhat different from the norm. The buildings were uncompleted when the Building Agreement was terminated. The construction had come to an abrupt end. In such situation, we are of the view that these questions are required to be answered in order to arrive at a decision on whether the respondent is entitled to the refund of the retention sum: (a) whether there was any defect to the buildings so constructed; (b) if there was, whether request was made by the 1st defendant and/or the appellant to the respondent to make good such defect; (c) if there was, whether the respondent had refused to remedy such defect; (d) if the

respondent had refused, whether the 1st defendant and/or the appellant had carried out such remedial work themselves and deducted the cost incurred from the retention sum?

[43] From the evidence adduced, we found that the appellant's witnesses have claimed that certain items in the buildings were missing or damaged. This was when they attempted to retake possession of the building site. But we found no request by either the 1st defendant and/or the appellant to the respondent to make good these missing or damaged items. And neither was there any evidence to quantify the amount spend in replacing and repairing them. In the absence of these, it must be implied that the 1st defendant and/or the appellant had agreed to forgo such claim to be paid out of the retention sum. For this, we are of the view that the retention sum must be refunded to the respondent. But should the appellant be made to refund the entire sum which is an accumulation of retention sums since progress claim no. 1? We do not think so. Since the representation is confined to principally payment of Interim Certificates no. 20-25 and progress claim no. 26, then it is our view that any refund of the retention sum by the appellant must be restricted to the amount retained under these certificates and claim.

Conclusion

[44] For reasons stated, we would only allow this cross-appeal in part. The appellant should refund to the respondent the amount retained under Interim Certificates no. 20-25 and progress claim no. 26.

Orders

[45] Accordingly, we made the following orders:

[46] Appellant's appeal in P-02-1030-2004 is dismissed with costs. Deposit for this appeal to the respondent towards account of taxed costs.

[47] Appellant's appeal in P-02-1148-2004 is dismissed with costs.

[48] Respondent's cross appeal in P-02-1148-2004 is allowed in part. The appellant should refund to the respondent the amount retained under Interim Certificates no. 20-25 and progress claim no. 26. Costs to the respondent for this cross appeal.